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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT SEATTLE

6 MAXILL INC., an Ohio corporation,  
7 Plaintiff,

8 v.

9 LOOPS, LLC; and LOOPS  
10 FLEXBRUSH, LLC,

11 Defendants.

C17-1825 TSZ

(consolidated with C18-1026 TSZ)

12 LOOPS, L.L.C.; and LOOPS  
13 FLEXBRUSH, L.L.C.,

14 Plaintiffs,

15 v.

16 MAXILL INC., a Canadian corporation,  
17 Defendant.

MINUTE ORDER

18 The following Minute Order is made by direction of the Court, the Honorable  
19 Thomas S. Zilly, United States District Judge:

20 (1) The motion for reconsideration, docket no. 126, brought by Loops, L.L.C.  
21 and Loops Flexbrush L.L.C. (collectively “Loops”), is DENIED.<sup>1</sup> Loops contends that  
22 the expert opinions and supporting photographs set forth in and/or attached to its motion  
23 for reconsideration are “not necessarily new.” *See* Loops’ Supp. Br. at 1:8 (docket  
no. 141). If true, then Loops is merely rehashing the arguments on which it did not  
previously prevail, and such repetition is not a basis for reconsideration. On the other  
hand, if the expert opinions and supporting photographs at issue constitute “new facts”  
within the meaning of Local Civil Rule 7(h)(1), Loops has not made the requisite  
showing that it could not have brought this evidence to the Court’s attention earlier with  
“reasonable diligence.” Loops expresses surprise that the Court sua sponte granted

<sup>1</sup> Although this matter is on appeal to the United States Court of Appeals for the Federal Circuit,  
the Court has jurisdiction to deny the motion for reconsideration. *See* Fed. R. Civ. P. 62.1(a)(2).

1 summary judgment in favor of the opposing parties, but Loops was on notice, when it  
2 filed its reply in support of its motion for summary judgment, and perhaps before then,  
3 that one of the challenges to its infringement claim was its inability to prove that the  
4 “elongated body” of the accused device is “flexible throughout,” as required by both  
5 Claim 1 and Claim 11 of United States Patent No. 8,488,285. Loops now says that it  
6 “assumed” it would have an opportunity to perform “flexing, bending and twisting  
7 demonstrations” for the trier of fact, see Loops’ Supp. Br. at 5 (docket no. 141), but it  
8 took the position in dispositive motion practice that the issue of whether the “elongated  
9 body” was “flexible throughout” could be decided as a matter of law, see Order at 8  
10 (docket no. 123). Loops’ new expert opinions and photographs also fail to establish any  
11 “manifest error” in the Court’s prior Order. See Local Civil Rule 7(h)(1). At most,  
12 Loops has demonstrated that the “head” of the allegedly infringing toothbrush deforms  
13 when subjected to the level of force exerted by pliers. Loops has offered no evidence  
14 that, after being manipulated with pliers, the “head” of the accused device rebounded to  
15 its previous shape or exhibited the characteristics of an item considered “flexible.”

16 (2) The motion for attorney’s fees, docket no. 128, brought by Maxill Inc., an  
17 Ohio corporation, and Maxill Inc., a Canadian corporation, (collectively “Maxill”), is also  
18 DENIED. Without stating “the amount sought” or “a fair estimate” of its attorney’s fees,  
19 see Fed. R. Civ. P. 54(d)(2)(B)(iii),<sup>2</sup> Maxill seeks a ruling that this case is “exceptional”  
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<sup>2</sup> Maxill’s failure to comply with Rule 54(d)(2)(B)(iii) does not appear to be inadvertent, but  
rather a strategic decision to avoid sorting through billing records while its entitlement to  
attorney’s fees remained uncertain. The Federal Circuit, however, has made clear that, in the  
context of 35 U.S.C. § 285, exceptionality is not a separate decision or sanction, but rather must  
be evaluated only in the process of ruling on a request for attorney’s fees. See Altair Logix LLC  
v. Caterpillar Inc., 2019 WL 3219485 at \*3 (D. Del. July 17, 2019) (citing Samsung Elecs. Co. v.  
Rambus, Inc., 523 F.3d 1374, 1379-80 (Fed. Cir. 2008)). The two-step procedure that Maxill  
proposes was rejected in Altair Logix because it is “particularly inefficient given that a court may  
decline to award attorneys’ fees even in cases found to be exceptional under § 285.” 2019 WL  
3219485 at \*3. The authorities cited by Maxill do not support its position. In ICON Health &  
Fitness, Inc. v. Octane Fitness, LLC, 576 Fed. App’x 1002 (Fed. Cir. 2014), the district court  
concluded that the case was not exceptional and declined to award attorney’s fees; the Federal  
Circuit vacated and remanded for further consideration in light of intervening Supreme Court  
decisions that altered the standard for exceptionality. In In re Rembrandt Techs. LP Patent  
Litig., 899 F.3d 1254 (Fed. Cir. 2018), the Federal Circuit vacated the district court’s award of  
attorney’s fees. Neither of these Federal Circuit opinions addressed the propriety of moving in  
piecemeal fashion for attorney’s fees in patent litigation. In GT Dev. Corp. v. Temco Metal  
Prods. Co., W.D. Wash. Case No. C04-451 TSZ, no judgment had been entered before the  
finding of exceptionality, and thus, Rule 54(d)(2)(B) was not implicated; rather, in allowing the  
plaintiff to voluntarily dismiss its patent infringement action pursuant to Federal Rule of Civil  
Procedure 41(a)(2), the Court concluded that the case was exceptional and permitted the  
defendant to file supplemental materials concerning the amount of its attorney’s fees and costs.  
See Order (C04-451, docket nos. 67 & 80). In Dolby Labs., Inc. v. Lucent Techs., Inc., N.D. Cal.

1 within the meaning of 35 U.S.C. § 285, which permits the Court to award reasonable  
2 attorney's fees to the prevailing party if the action "stands out from others with respect to  
3 the substantive strength of a party's litigating position" or "the unreasonable manner in  
4 which the case was litigated." See Octane Fitness, LLC v. ICON Health & Fitness, Inc.,  
5 572 U.S. 545, 554 (2014). The Court finds nothing "exceptional" about this matter. The  
6 parties engaged in run-of-the-mill discovery battles, resulting in only a few discovery  
7 motions, as to which the Court declined to award attorney's fees or costs to either side.  
8 See Minute Order (docket no. 40); Minute Order (docket no. 70); see also Minute Order  
9 (docket no. 80). In its motion for attorney's fees, Maxill refers to litigation in other  
10 forums involving some of the same parties, Maxill's rebuffed attempts at settlement, and  
11 Loops' unsuccessful motions to stay, docket no. 50, and for leave to amend its complaint,  
12 docket no. 72, but none of these events are unusual or displayed unreasonableness, and  
13 although the Court ultimately concluded that Loops' infringement claim lacked merit, the  
14 Court does not agree with Maxill that Loops' positions were objectively baseless.

15 (3) The Clerk is directed to send a copy of this Minute Order to all counsel of  
16 record.

17 Dated this 20th day of February, 2020.

18 William M. McCool  
19 Clerk

20 s/Karen Dews  
21 Deputy Clerk

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23 Case No. C01-20709 JF, the district court noted that, in seeking attorney's fees, the plaintiff had  
not complied with Rule 54(d)(2)(B)(iii), but opted not to deny the motion on that ground,  
observing that "the length and complexity of the instant litigation would have made it difficult  
for [the plaintiff] to provide even an estimate of its attorney's fees." Order at 8 (C01-20709,  
docket no. 743). Maxill cannot make a similar assertion in this matter. Moreover, even if filing  
two motions (one for exceptionality and another for an award of fees) was proper, the second  
motion would still need to be filed within the time period prescribed in Rule 54(d)(2)(B), see  
Altair Logix, 2019 WL 3219485 at \*3; see also IPXL Holdings, L.L.C. v. Amazon.com, Inc., 430  
F.3d 1377, 1385-86 (Fed. Cir. 2005), a task that Maxill is now unable to accomplish, and  
Maxill's violation of Rule 54(d)(2)(B) constitutes an additional and/or alternative ground for  
denying its motion for attorney's fees under § 285.